United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE
UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 13806 April Term, 1957

LEON ELLSWORTH COOK,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

United States Court of Appeals
For the
District of Columbia Circuit

FILED AUG 13 1957

Joseph W. Stewart
CLERK

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BRIEF FOR APPELLANT

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STATEMENT OF QUESTION PRESENTED

The question is whether, despite the failure of defense counsel to note objections below, the record shows a conviction of murder in the second degree based upon such a "plain error" that a new trial should be granted by this Court under Fed. R. Crim. P. No. 52.

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3. JURISDICTIONAL STATEMENT

This case was founded upon an indictment for first degree murder within the District of Columbia (§§22-2401 of the District of Columbia Code). The jurisdiction of the District Court was founded upon §11-306 of the District of Columbia Code.

The jurisdiction of this Court on appeal is founded upon the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28 U.S. Code §1291.

II. STATEMENT OF THE CASE

This conviction of murder in the second degree results from the death of one Charles Moore in his home at 1217 Constitution Avenue, N.E. in the District of Columbia in the early morning of July 15, 1956 as the result of a bullet wound from a pistol fired by the defendant. The story behind the shooting is as follows.

Beginning about ten years before the shooting, the defendant had lived extra-maritally with a woman named Juanita Mattison (NT. pp. 12, 13, 35, 39, 199). As a result of their liason, Juanita had a child, of which the defendant was the father, born 23 October, 1945 (NT. pp. 13, 36, 39, 202). Juanita and the defendant were never married (NT. p. 14).

Their relationship continued up to a period fairly close to the time of the shooting. As late as December, 1954 she represented herself to the police authorities as defendant's "common-law wife" (NT. pp. 43-5, 70-2, 191). The testimony is, however, conflicting as to the last time that they had intercourse together (NT. pp. 53-6, 205-6).

The parties purchased a house together at 1110 T Street, N.W. for the benefit of their baby (NT. pp. 14, 201-2), of which the defendant contributed at least half of the funds (NT. pp. 14, 200-2, 211-2).

The defendant some time before the shooting took up with another woman with whom he lived at the Dunbar Hotel, and by whom he also had a child extra-maritally (NT. pp. 165, 177, 335-6). Some time in 1953, Juanita, when working at the Congressional Country Club (NT. pp. 11, 45) met Charles Moore, the decedent, who also worked at the

finally planned to marry (NT. p. 49). Defendant was told of this a short time before the wedding, was introduced to Moore and congratulated them (NT. pp. 49-51, 178, 204-6). They were married on July 11, 1956, just four days before Moore was killed (NT. pp. 15, 16).

Immediately after the wedding, Juanita and the decedent began living at 1217 Constitution Avenue, N.E., a home owned by the deceased's mother (NT. p. 23). Apparently there had been a number of meetings, conversations and telephone calls between the defendant, the deceased and Juanita during the two or three weeks immediately preceding the shooting (NT. pp. 204-9). All of these were friendly and non-acrimonious. The defendant was particularly interested in what would happen to the real estate owned jointly by Juanita and himself, as a result of the marriage, and what provisions should be made for the child (NT. pp. 50, 207-9, 242-3, 250). They agreed tentatively to put the jointly-owned house into a "fund" for the benefit of the child (NT. p. 50). The defendant was to consult with a lawyer (NT. pp. 51, 207-9, 243-6). The defendant had understood that he would be welcome in the new Moore home, and he understood that he had some sort of blanket invitation to visit at a convenient time (NT. pp. 209, 211, 213, 220, 243, 247-8, 250, 252).

The events which transpired on the morning of the shooting were as follows.

Some time before 6:00 o'clock in the morning when Juanita and the deceased were in bed (NT. p. 24), the defendant rang the bell and knocked on the door, but received

no reply (NT. pp. 262, 266-7). He thereupon drove to a service station some blocks away, and some time around 6:00 o'clock in the morning defendant called the Moore home on the telephone (NT.pp. 24, 179-80). The defendant fixed the time at 6:05 a.m. (NT. pp. 214, 265). Moore answered the phone and called Juanita who talked with the defendant (NT. pp. 24-5, 180, 214, 262). The defendant asked why they had not answered him at the door. Juanita replied that she had not heard the bell, and he said that he was coming around. (NT. pp. 25-6, 180, 214, 262). Although Juanita had originally said there was no further conversation (NT. p. 26), she later, on further prompting by the prosecutor, quoted the defendant as stating the purpose of the visit "You will find out when I get there" (NT. pp. 26, 30).

The defendant hung up the phone at the service station, got into his car, drove back to the Moore residence, which took several minutes, and arrived there at somewhere between 6:12 a.m. and 6:15 a.m. (NT. p. 265). The defendant rang and knocked, waiting for several minutes without any response (NT. pp. 180, 266-8). The defendant then broke the glass in the front door with both hands, cutting the back of his hands (NT. pp. 111, 126, 180, 221, 268-9), apparently in an agitated and disturbed state (NT. pp. 221-2, 266-8, 277).

Having broken the glass, he reached inside, opened the doorknob, and entered the house (NT. pp. 221-2, 269-70). He said he was not aware of what he was doing (NT. pp. 222, 270-1).

The record is almost empty as to what happened in the Moore bedroom from the time of the telephone call from the defendant at 6:00 a.m. or 6:05 a.m. and the time

dead, and Juanita was the only available witness. Juanita testified that she went back to bed after the telephone call, and after some conversation with Moore, he agreed that she should call the police. She did so stating that there was "a man trying to break in" (NT. p. 26), and that then, "while we were waiting for the policeman to come," the doorbell rang and she heard glass breaking and footsteps coming into the house (NT. p. 26). She was at that time standing at the window waiting for the police to come while her husband went to the closet and took out a rifle (Exhibit No. 5, NT. pp. 27, 56). He also got out an automatic pistol. (Exhibit No. 3, NT. pp. 57, 60, 77). Moore then stepped into the hall and "a few minutes" thereafter she heard a shot and ran into a closet (NT. pp. 27-8), where she hid until Cook pulled her out (NT. pp. 28, 223, 273-4). Cook then pulled her into the hall where she saw Moore's body lying at the top of the steps, and the police were just entering the house and beginning to climb the stairs (NT. pp. 28-9).

The defendant testified that after he entered the house he started climbing the stairs. He had a pistol with him under his shirt and belt (NT. pp. 180, 222). As he climbed the steps, Moore suddenly appeared before him aiming a rifle and a pistol at him. The defendant called out "No," and attempted to withdraw. Moore continued to aim the rifle and pistol at him, and appeared to be trying to shoot, whereupon he drew his weapon and fired the bullet inflicting a fatal wound in the neck (NT. pp. 20, 222, 273). The police testimony indicated that Moore had attempted

it had jammed when the attempt had been made to cock it and fire it (NT. pp. 77, 81-2, 119-20, 141-3, 169). The police officers and the police records all showed that there had been no telephone call from Juanita until 6:30 a.m. and that the police had arrived on the scene not more than four or five minutes after the call (i.e. at 6:34 or 6:35), by which time the shooting had already taken place (NT. pp. 73-6, 90-1, 150-1, 217). The defendant was in the house at the most three or four minutes (NT. p. 275).

The police arrived at 6:34 or 6:35 (NT. p. 91), and the defendant surrendered voluntarily (NT. p. 93-4). He was taken to the police station and, without benefit of counsel, gave a statement which began at 9:37 a.m. and ended at 11:18 a.m. (NT. pp. 105-6, 152). The statement was introduced into evidence without objection and read to the jury (NT. p. 178-184).

Counsel for the defendant at the trial waived all defenses on behalf of the defendant other than self defense (NT. pp. 185-8, 310, 315-6). Further, neither the prosecutor, defense counsel nor the trial judge considered or mentioned to the jury either in examination of witnesses, in arguments or in the charge, the question of the defendant's mental state at the time of his entry into the house, nor the important issue of what had transpired during the nearly one-half hour between the defendant's telephone call and Juanita's telephone call to the police, and its bearing on the case. In fact, counsel for the defendant affirmatively excluded any defense based on insanity (NT. p. 288).

In his closing argument, the prosecutor, in arguing the defendant's intent, and referring to defendant's

phone call at 6:05 from the service station, said (NT. p. 301):

> "Isn't it pretty obvious that when he called he must have sounded rather menacing and antagonistic? Otherwise, after he made the call, why would Juanita Moore have been so concerned that she immediately called the police? Now you know why. She was afraid." (emphasis supplied)

And immediately thereafter (NT. p. 302) he said:

> "She called, but unfortunately the police didn't get there on time...."

Neither counsel for the defendant nor the court commented at any time upon these prejudicial statements of the prosecutor, nor their obvious inaccuracy in view of the passage of the nearly one-half hour of time between the defendant's phone call and Juanita's call to the police.

The charge of the Court on the legal factors of self-defense was unexceptionable. It properly left to the jury for consideration, and emphasized the importance of, the question of the defendant's intent on entry into the house, as a vital factor of their consideration of self-defense (NT. pp. 284, 291, 340-1, 343-4), but omitted any consideration of the passage of time, or of his having entered by breaking the glass with his hands, or of his failure to draw his weapon until after he was faced by Moore holding two weapons in his hands pointed at the defendant.

The charge, in fact, compounded the prosecutor's prejudicial misstatement in his summation, quoted above, by paraphrasing the Government's contention, and omitting all reference to the passage of nearly one-half hour (NT. p. 330).

The Court left to the jury issues of murder in the first degree, murder in the second degree and man-

slaughter. The jury specifically found the defendant not guilty of murder in the first degree, not guilty of manslaughter, but guilty of murder in the second degree (Record p. 379). Defendant's counsel filed no motion for new trial, but a motion was filed by the defendant himself (without assistance of counsel) (Record p. 380-3). The argument for the motion on new trial was perfunctory (NT. (new trial) pp. 1-21), and none of the questions raised on this appeal were argued or even suggested.

In fact, defendant's counsel clearly indicated he thought the defendant had done quite well and had been lucky to escape a first degree conviction (NT. (new trial) pp. 2, 3, 7). The trial judge concurred (NT. (new trial) p. 15).

III RULE INVOLVED

Fed. R. Crim. P. No.52.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

IV STATEMENT OF POINTS

(1) Under Fed. R. Crim. P. No.52(b), this Court may consider "plain" errors not raised below.

(2) This record discloses the following "plain" errors:-

(a) A basic misstatement of fact, on a vital issue, in the prosecutor's summation, indirectly confirmed in the Court's charge.

(b) A failure to bring to the attention of the jury an important fact bearing directly on malice and intent.

(c) The admission of a confession, over objection, which was inadmissible under the Mallory rule.

(A) The issue on this appeal is whether there was such "plain" error or defect in the record below, as to require a new trial under the beneficent provisions of Fed. R. Crim. P. No.52(b).

That Rule is broadly interpreted in the decisions of this Court, and restates the practice here of checking the record in all serious criminal cases for prejudicial error, whether raised in the record or not. The Rule is broad enough to include all three of the points urged on this appeal:-

(1) The misstatement of a basic fact in the prosecutor's summation and the Court's charge.

(2) The failure to charge the jury on an essential issue.

(3) Erroneous admission of a confession.

(B) The Court properly charged the jury that a vital factor in the defendant's right to claim self-defense in the shooting was the defendant's intent on his entry into the decedent's home. The prosecutor argued to the jury that the entry was with the intent to make trouble and cause an affray. He based this argument, in substantial part, on the assertion that defendant's telephone call to the house announcing his visit had been so threatening that the decedent's wife had immediately called the police in fear. This was a complete misstatement, since the police records and testimony show that it was nearly one-half hour after the 'phone call before the police were called; and in fact it was nearly one-quarter hour after the defendant had arrived at the front door.

The Court repeated and confirmed this statement by repeating to the jury, in paraphrase, the prosecutor's

made no comment to the jury, in his charge, about the fact that defendant, although in possession of a pistol, had broken the glass of the front door with his bare fists, and had entered the house with his weapon still concealed. No reference was made to the impact of this fact on malice and intent.

(D) Lastly, the defendant's confession was admitted, over objection of defense counsel, in direct violation of the Mallory rule. This confession, not offered voluntarily by the defendant, was the result of deliberate interrogation by police officers, not resisted by the defendant, which began 2.1/2 hours after his arrest and lasted for a total of 2.1/2 hours, although a committing magistrate could have been reasonably secured for arraignment. Further, the defendant was not advised of his right to consult with counsel before making any statement to the police.

A. Preliminary Statement

We do not seek a new trial on the sole ground that there was error in the charge. We would be met by Fed. R. Crim. P. No. 30 and the fact that no exception was taken below, McAlister v. United States, 99 App. D.C. 356, 239 F(2d) 76 (1956); Pitts v. United States, 99 App. D.C. 63, 237 F(2d) 217 (1956).

Neither do we seek a new trial on the sole ground that defendant's counsel inadequately represented his interests. We would be met by the decisions of this Court in Burton v. United States, 80 App. D.C. 208, 151 F(2d) 17 (1946) and Harley v. United States, ____ App. D.C. ____ ____ F(2d) ____ (1957); Offutt v. United States, ___ App. D.C. ____ ____ F(2d) ____ (1957).

Nor do we seek a new trial on the sole ground that the prosecutor misstated a significant fact in his summation. We would be met here with the rule of United States v. Cross, 20 D.C. 365 (1892).

Nor do we seek a new trial on the sole ground that the defendant's "statement" or "confession" may have been inadmissible under the decision of the Supreme Court, on June 24, 1957, in Mallory v. United States, ____ U.S. ____.

The new trial here is sought under Fed. R. Crim. P. No. 52(b) on the ground that there was "plain error or defect" in this trial which directly "affected" the "substantial rights" of this defendant-appellant. It is the combination of many separate factors in the record which we urge as the ground for reversal.

The points we propose to argue, although they cry out from the record, were never mentioned by defense counsel, were never given to the jury by the trial judge, were not included in the defendant's motion for a new trial (filed by the defendant himself, not by his counsel), were not argued on the hearing on the motion for a new trial, and are not included in the appeal papers prepared and filed by the defendant himself, without counsel, prior to our appointment by this Court as appellant's counsel.

Nevertheless, we feel that the case falls within the rule of McAffee v. United States, 70 App. D.C. 142, 105 F(2d) 21 (1939), and O'Malley v. United States, 227 F(2d) 332 (CA 1st 1955), cert. denied 350 U.S. 966 (1956). It represents the kind of "exceptional circumstances," the type of "extreme or unusual case" where a new trial may be ordered even though everyone below overlooked the points in question. We urge that there is "plain error or defect" within the meaning of Fed. R. Crim. P. No. 52(b). A citizen sentenced to ten to thirty years of imprisonment should be entitled to ask relief of this Court on the merits.

B. The General Principles Applicable To Fed. R. Crim. P. No. 52(b)

There are a large number of cases decided on the application of the broad language of Rule 52(b). It uses the vague term "plain error or defect." A careful reading of all of the cases which we have been able to find, under the Rule, has not uncovered any case which is exactly like the case at bar. There are, however, precedents which will be useful in so far as they lay down principles which can be applied to the case at bar.

has been held to include matters "of such a nature that they must be corrected to prevent a manifest injustice" [United States v. Achilli, 234 F(2d) 797, 809 (CA 7th 1956)]; errors which "have seriously prejudiced the defendant or affected the fairness, integrity or public reputation of judicial proceedings" [United States v. Sanzone, 231 F(2d) 887 (CA 2d 1956), cert. denied 351 U.S. 987 (1956); Lash v. United States, 221 F(2d) 237, 241 (CA 1st 1955)]; error "which is seriously prejudicial or amounts to a grave miscarriage of justice" [Lazaro v. United States, 225 F(2d) 319 (CA 6th 1955); Bloch v. United States, 221 F(2d) 786 (CA 9th 1955)]; "grave error amounting to denial of a fundamental right" [Apodaca v. United States, 188 F(2d) 932, 937 (CA 10th 1951)].

Rule 52(b) expounds no new principle. It is simply a restatement of the prior practice following the rule laid down in United States v. Atkinson, 297 U.S. 157 (1936) at p. 160:

> "In exceptional circumstances, particularly in criminal cases, appellate courts in the public interest may .... notice errors to which no exception has been taken if the errors are obvious or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

See also United Brotherhood v. United States, 330 U.S. 395, 412 (1947); United States v. Raub, 177 F(2d) 312, 315 (CCA 7th 1949); United States v. Jones, 204 F(2d) 745, 749 (CA 7th 1953); McAffee v. United States, 70 App. D.C. 142, 105 F(2d) 21 (1939).

The Rule has been interpreted recently in two opinions in this Court by Judge Bazelon. In Tatum v.

the court says at pp. 388-9:

> "It has always been the custom of this Court, however, 'in cases of serious criminal offenses to check carefully the record for error prejudicial to defendant which he did not urge.' This accords with Rule 52(b) of the Federal Rules of Criminal Procedure ...."

In Simmons v. United States, 92 App. D.C. 122, 206 F(2d) 427 (1953), the court said at p.

> "And since it affected substantial rights of the appellant we exercise our authority under Rule 52(b) to take note of it."

This Court also quoted and followed United States v. Atkinson, supra, in Thomas v. District of Columbia, 67 App. D.C. 179, 90 F(2d) 424 (1937) and McAffee v. United States, 70 App. D.C. 142, 105 F(2d) 21 (1939), in which the Court said at p. 151:

> "It is settled that if plain error is committed in a matter vital to the defendant in a criminal case, the appellate court is at liberty to notice and correct it even though it has not been brought to the attention of the trial judge or the appellate court in the usual manner."

Judge Murphy in United States v. Stoehr, 100 F. Supp. 142 (MD Pa. 1951), affd. 196 F(2d) 276 (1952), cert. denied 344 U.S. 826 (1952) said at p. 152:

> "Notwithstanding what his counsel did, the defendant has a right to have his guilt or innocence found by a jury according to the procedure and standards appropriate for criminal trials in the federal court. If any error was therefore committed during the course of the trial which affected his substantial rights, the failure of counsel to call it to the trial court should not preclude its being noticed and corrected."

The Rule is particularly applicable in homicide cases. See Austin v. United States, 208 F(2d) 420, 421 (CA 5th 1953); United States v. Puff, 211 F(2d) 171 (CA

[illegible] 1964); Tatum v. United States, supra.

The Puff case, supra, states an even broader rule, namely, that the Court is:

> "reluctant--if not unwilling--to deem a substantial claim of error foreclosed by waiver of counsel."

In other words, the appellate court may, in an appropriate case, review matters which counsel have failed to raise and may also review questions which counsel in the court below may have specifically waived.

C. What Type Of Questions May Be Raised Under Fed. R. Crim. P. No. 52(b)

There is ample authority for consideration under Rule 52(b) of the general type of error which is asserted in this case.

Error in the charge of the court, including the failure to charge on an essential issue, may be raised under the decisions in Lazaro v. United States, supra; Bloch v. United States, supra; Tatum v. United States, supra, at p. 389; Braswell v. United States, 200 F(2d) 597 (CA 5th 1952); United States v. Cumberland, 200 F(2d) 609 (CA 3d 1952); United States v. Kemble, 197 F(2d) 316 (CA 3d 1952); Lockhart v. United States, 183 F(2d) 265 (CA 4th 1950); and Daigle v. United States, 181 F(2d) 311 (CA 1st 1950).

Serious misstatement of fact by the prosecutor in closing argument may be raised under the decisions in Shelton v. United States, 83 App. D.C. 257, 262, 169 F(2d) 665 (1947) cert. denied 335 U.S. 834 (1948); Himmelfarb v. United States, 175 F(2d) 924 (CA 9th 1949); Kaufman v. United States, 163 F(2d) 404 (CA 6th 1947); and particularly

> "No objection was made to the remarks of Government's counsel made during the closing argument. This court can nevertheless consider a plain and palpable error even though not objected to."

Even a specific concession and waiver of a defense by counsel can be reviewed. In addition to United States v. Puff, supra, this point was squarely raised in Tatum v. United States, supra, where Judge Bazelon said at p. 392:

> "Lacking precedent for an instruction to the jury along that line, counsel selected the course we have described. Even so we think he went too far. His client had not conceded guilt. On the contrary, as we have seen, an issue of mental capacity had been raised. When counsel conceded to the jury that a verdict of guilty was proper, he conceded away that defense. Thus, by action of court-appointed counsel, appellant was deprived of the judgment of the jury upon the defense he had advanced and also upon the credibility of the prosecution's case. We think that in the circumstances of this case the action of counsel was a defect 'affecting substantial rights.' We are not of course implying any general restriction upon concessions by counsel, some of which are not only proper but highly commendable."

Lastly, misstatement of a fact by the judge in his charge, on an essential point, may be raised. This is squarely held in the opinion of this Court in Robertson v. United States, 84 App. D.C. 185, 171 F(2d) 345 (1948), where the court applied Rule 52(b) to an error of the trial judge misquoting the testimony of a witness, although no objection was made in the trial court. This Court said, at p. 186:

> "However, we cannot escape the conclusion that in both instances the errors complained of were plain; that the natural and probable influence upon the jury was prejudicial, and that

tial verdict of the jury was substantially affected."

Against this legal background, we can now examine the record of this conviction.

D. The Important Misstatement Of Fact In The Summation And Charge

The first basic element of error in this record is the important misstatement of fact by the prosecutor on a vital issue in the case, which misstatement was reinforced by the court's charge to the jury.

Admittedly, the defendant entered Moore's house by breaking the glass and letting himself in, Moore and his wife having declined to answer the doorbell or his knocking and to let him in voluntarily. This must be conceded.

Further, it cannot be contested that the defendant did not draw his gun and fire until after Moore appeared at the top of the stairs with his rifle and pistol, both pointed at the defendant, and until after Moore had unsuccessfully attempted to cock and fire his pistol.

Trial counsel for the defendant founded his entire defense on the issue of self-defense. The trial judge properly ruled that, under the facts in the record, a basic factor in the defendant's right of self-defense was the defendant's intent at the time of his entry into the house (NT. pp. 284, 291, 340-1, 343-4). The court correctly told the jury that the mere fact that the defendant was a trespasser on Moore's property did not destroy the right of self-defense (NT. p. 339), and that there would be no right of self-defense if the defendant had entered the property

trouble". (NT. p. 340-3). A reading through of the entire charge of the court on the question of self-defense (NT. pp. 337-45) shows how importantly the trial judge stressed this question of the defendant's intention on entry.

We must therefore examine with the greatest of care the testimony of the witnesses with respect to the question of entry and the argument of the prosecutor and the charge of the court in so far as they refer to the testimony and these facts.

The testimony of the principal prosecution witness, Juanita Moore, was most unsatisfactory and inadequate.

Juanita testified that the defendant had telephoned around a quarter of 6 or around 6:00 o'clock; that the conversation had been extremely brief; that she had asked her husband whether to call the police; that she had telephoned the police; that she stood for several minutes by the window waiting for the police to come; that she then heard the breaking of the glass; that her husband then got out of bed and got his rifle; that he went out into the hall; that he was there for "several minutes" and that she then heard a shot and ran into the closet.

The defendant fixed the time of his telephone call at 6:05. He arrived at the house some seven to ten minutes later, namely, 6:12 to 6:15, knocked on the door and rang the bell, waited several minutes and then broke the glass with his fists and let himself in.

However, the police records and the testimony of the police show that there was no call of any kind until 6:30 and that the police were there within three or four minutes. By the time the police arrived the shooting had already taken place.

Further, Juanita testified that her phone message to the police was that "it was a man trying to break in." (NT. p. 26). By 6:30, when she called the police, at least 25 minutes had gone by since the defendant had called on the phone and at least 15 minutes had gone by since the defendant began ringing the bell and knocking on the door.

Since both Juanita and the defendant agree that the telephone call from the defendant took place at 6 o'clock or 6:05 and since the police records show unequivocally that Juanita did not telephone the police until 6:30, what went on in the Moore bedroom for the nearly one-half hour between the telephone call from Cook and the call for the police? More importantly, what took place in the Moore bedroom during the 15 or more minutes from the time that the defendant arrived at the house at 6:12 or 6:15 and began ringing the bell and knocking on the door before he broke the glass and let himself in?

One thing is quite certain. Juanita could not have been in the least frightened initially by defendant's telephone call or his impending visit. Certainly she would not have waited nearly one-half hour to call the police if this had been so. We can only speculate as to what happened, since Juanita was not asked and gave no explanation.

It is quite conceivable that Juanita and her husband may have had a violent argument about letting the defendant in. Juanita may have argued in favor of it and

her husband may have argued bitterly against it, saying that he would use force if necessary to prevent the defendant's entry. The defendant apparently expected that he would be let in peacefully and was justifiably upset when he was refused entry a few minutes later. Moore may have armed himself, not to defend himself and his wife, but deliberately for the purpose of shooting the defendant if he sought entry to the house. The fact that one of his weapons was jammed, apparently in an effort to fire it, supports such a speculation.

Yet there is not a word of comment in the entire record about this vital issue of the passage of time. The prosecution never mentioned it. The judge never mentioned it. Most inexplicably, defense counsel never mentioned it, even though he had specially recalled a police witness to prove that there had been no earlier call (MT. pp. 316-7).

How this whole point was missed is beyond the comprehension of the writer of this brief. It was obvious on the face of the record and even the taking of the sketchiest of notes by either counsel or the judge would instantly have pointed up this vital half-hour discrepancy.

We come now to the summation and the charge.

Mr. Flannery in his closing speech to the jury eventually reached the basic question of the defendant's intent on entering the house. He argued that the jury could find an intention on the part of the defendant to look for trouble by reason of the defendant's angry and threatening telephone talk with Juanita. In attempting to convince the jury on the issue of the defendant's intent Mr. Flannery said (MT. p. 301):

> called he must have sounded rather menacing and antagonistic. Otherwise after he made the call why would Juanita Moore have been so concerned that she immediately called the police? Now you know why. She was afraid." (emphasis supplied)

Conceding that the prosecutor has the widest freedom to comment on the evidence and to argue all reasonable inferences which can be drawn from the testimony, nothing can possibly justify this complete misstatement of the facts.

Juanita's own evidence plus the official police records and the testimony of the police all show that Juanita never called the police until nearly one-half hour after the telephone conversation was concluded. No interpretation of the testimony can warrant the prosecutor's statement. It was a very effective argument and it is inconceivable that it did not have an effect on the jury, on the question of this intent.

We may note also that Mr. Laughlin, trial counsel for the defendant, made no comment on this statement of Mr. Flannery's, did not object to it, did not respond to it and did not ask the court to caution the jury with respect to it; or to state to the jury the true facts on this timing, even though he had recalled the police witness to emphasize the point.

The error was then further compounded in the charge to the court. Judge Youngdahl in reviewing the arguments of the prosecution (NT. p. 330) referred to the telephone conversation and then said:

> "The Government claims that Juanita then called No. 9 Precinct Police Station ...."

This language of the court, in its context, tended to

immediately.

The judge made no comment about the passage of time, although he specifically told the jury that defendant's telephone call had been made at 6:05 (NT. p. 333).

It seems obvious that defendant was substantially prejudiced, and that the prosecutor's effective point must have substantially influenced the jury on the question of the defendant's intent to look for trouble on his arrival. To the contrary of prosecutor's argument, the timing of the two telephone calls would seem to leave no inference, except that the call was normal and friendly and in no way "menacing and antagonistic," and that Juanita was not in the least "afraid" as a result of it.

With this argument planted in the minds of the jury, and substantiated by the charge of the court, did the defendant have the right to the "fair and impartial verdict of the jury" which this Court required in Robertson v. United States, supra?

It is true that the trial judge charged the jury that their recollection of the testimony is conclusive and that they could disregard anything said by counsel or by the court with respect to the evidence if the jury's recollection varied (NT. pp. 326, 334).

The giving of this formula to the jury, however, is not a panacea which cures all ills of all erroneous statements by counsel or by the court. Rather this is a case for the application of the principle laid down by Judge Goodrich in United States v. George, 210 F(2d) 45 (CA 3d 1954) at p. 47:

ial to call for reversal. It is not the kind of thing where the statement of a general rule or the citation of authorities can give very much aid." (emphasis supplied)

Here the case is even stronger. The court did not "carefully instruct the jury to disregard" the clear misstatement of Mr. Flannery. To the contrary, the court in effect repeated the statement in summarizing the case for the jury.

Whether the test be that of homicide cases, namely, that the conviction can stand only if "the jury was not substantially influenced," (United States v. Dressler, 112 F(2d) 972, 981 (CCA 7th 1940) or the same as in civil cases, namely, that there must be a reversal "unless it affirmatively appears from the whole record that it was not prejudicial," (McCandless v. United States, 298 U.S. 342, 347 (1936)), the defendant here is entitled to a new trial.

E. The question of the Breaking of the Glass.

A further omission in this trial record is proper treatment of the curious and unexplained fact of the breaking of the glass in the door by the defendant with his bare hands.

The defendant arrived at the front door with his pistol in his belt under his shirt (NT. pp. 254, 257-8, 261-2). He had been drinking, but there is no claim he was not sober (NT. pp. 180). His knocking and ringing gave no response. He then broke the glass in the door with his two fists, cutting them seriously (NT. p. 180). This was a wholly irrational act. Had he wished to break the glass,

coolly intending trouble, he would naturally have gone in weapon first, knocking out the glass with the pistol and then climbing the stairs with his pistol drawn. Instead, he never took the pistol out from under his shirt until the last moment. He performed the wholly irrational act of breaking the glass with his bare hands, and then climbed the stairs empty-handed, until faced by Moore with the two guns drawn.

We do not suggest that this opens a defense of insanity within the Durham rule.

The court, Mr. Flannery and Mr. Laughlin all discussed the question of insanity preliminarily (NT. pp. 279-80) and, just before the summations began, Mr. Laughlin conceded of record that there was no basis for any such contention (NT. p. 288).

We can put to one side the defendant's own story of his condition at the time of the shooting, that he was "disturbed" (NT. pp. 215, 263, 266), "nervous" (NT. pp. 221, 267-8), "shaking" (NT. pp. 221, 268), "trembling" (NT. p.267), "dazed" (NT. p. 232), "worked up" (NT. p. 232), "depressed" (NT. p. 232), that "I wasn't aware of what I was doing (NT. pp. 232, 268, 270), that "I was not myself (NT. pp. 223, 271), that he had a "craze" to see Juanita (NT. pp. 269,275).

Nor do we suggest that this may be a case in which this court may wish to reconsider the open question in Stewart v. United States, 94 App. D.C.293, 214 F(2d) 879 (1954). Nevertheless, there is a real question here of vital importance to the defendant. Was this killing the result of malice, or was this a killing without malice, committed with "passion and hot blood" and therefore nothing greater than manslaughter?

on this issue?

This whole episode was passed over by everyone; the court, the prosecutor and defense counsel. But should it not have been called specifically to the attention of the jury, as bearing importantly on malice and intent? Did the defendant have his rights fully and properly protected when the case was left with the jury in total disregard of this problem?

F. Defendant's Confession

The recent decision in Mallory v. United States, _____ U.S. _____, on June 24, 1957, casts substantial doubt on the validity of defendant's written confession (NT. pp. 175-184) and its admissibility.

The facts respecting it are as follows. The shooting took place within a minute or two before or after 6:30 a.m. The police arrived at 6:34 a.m. or 6:35 a.m. (NT. p. 91). The defendant was arrested and put into the patrol wagon before Sergeant Rudbeck arrived at 6:40 a.m. (NT. pp. 97, 138). His exact arrival time at the police station was not disclosed.

At 9:00 a.m. (about 2.1/2 hours later) he was brought to the homicide squad office for questioning (NT. p.143). Written interrogation began at 9:37 a.m., (NT. p.175) almost exactly 3 hours after the shooting, continued for 1 hour and 45 minutes and ended at 11:18 a.m., (NT. p.184), almost 5 hours after the shooting. There is no suggestion of any force of any hint that "third degree"

[illegible] about his right to consult counsel before he made any statement (NT. p. 156).

The facts in this case are not the same as in Mallory, but certain general principles enunciated in Mallory are completely applicable.

As the Supreme Court said:

> "The arrested person may of course be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt." (emphasis supplied).

What the Supreme Court here forbids, is exactly what happened in this case. The defendant was taken to headquarters (the homicide squad office) for the express purpose of "inquiry" to elicit "damaging statements to support the arrest" and the defendant's guilt. In fact those "damaging statements" were offered in evidence, both as oral testimony and as a written confession, to assist in convicting the defendant, over the objection of defense counsel (NT. p. 149).

The motives of the police appear to be wholly irrelevant. The Supreme Court said further:

> "In every case where the police resort to interrogation of an arrested person and secure a confession, they may well claim, and quite sincerely, that they were merely trying to check on the information given by him."

It is true that, in its opinion, the Supreme Court said:

> "Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties."

But is this the case of a "story volunteered by the accused"? If it is, then what is not?

The oral questioning did not begin until 9:00 a.m., 2.1/2 hours after his arrest. There was apparently 1/2 hour of this (NT. p.143) and then a typist was called in to take down a full 1.3/4 hours of questioning, which takes up only three sheets of paper. The confession, including both questions and answers, is only 1,700 words. It is obvious that the questions and answers could not have been continuous, even if written in longhand. There were obviously lengthy discussions, rephrasings and editing before the final answers were typed out.

Donohue, the typist, was a "thorough" but not "expert" typist, as far as speed goes. But he was better than a "two-finger" man. (NT p. 152). The defendant had been cautioned not to talk too fast and the typist took it down as the defendant spoke and without stopping him (NT. pp. 157 - 9). The statement proceeded <u>without interruption at any time</u> (NT. p. 159)

This appears preposterous on its face. To consume 101 minutes to type 1700 words means that this voluble defendant talked, and this "thorough" typist typed, at the rate of 17 words a minute only, with most of the words simple words of two, three and four letters.

This is the antithesis of a "story volunteered"; this is a story produced from vigorous, extended and skillful police interrogation, adverse rather than volitional.

Mr. Flannery and Sergeant Rudbeck made this clear. The defendant was "brought down to the homicide squad office for the purpose of taking a statement". What Sergeant Rudbeck did was to "<u>seek to question the defendant</u>" about what had happened; the defendant didn't ask to volunteer a story (NT. p. 143).

> ".... police detention of defendants beyong the time when a committing magistrate was readily accessible constituted "wilful disobedience of law".

Where was such a magistrate accessible here? In the District of Columbia, the United States Commissioner and all sixteen judges of the Municipal Court (D.C. Code §11-752) are qualified as committing magistrates (D.C. Code §§11-602, 11-755 (a)). We do not suggest that the police should have called any one of them out of bed at 6:30 a.m., on this Sunday morning to open court and arraign this defendant.

In any event, it would certainly not have been unreasonable for the police to have called one of the seventeen available functionaries at 9:00 a.m. or 9:30 a.m. in the morning to arraign this defendant and comply with Fed. R. Crim. P. Nos 5(b) and 5(c). Had this been done there would have been no interrogation and no statement, and none to introduce into evidence.

Every requirement of Mallory, to invalidate this confession, has been met. Its admission, over objection, was error and a new trial should be granted.

G. Conclusion

It is respectfully submitted that this conviction should be set aside, for the reasons given, and that the defendant should be granted a new trial, in which the improper confession will be excluded, and in which the vital issues will be fully and properly examined and submitted to the jury.

Respectfully submitted

Philip W. Amram

Philip W. Amram
807 Ring Building
Washington 6, D.C.
Attorney for Appellant

August 13, 1957

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED OCT 1 1957
Joseph W. Stewart
CLERK

No. 13,806

900

LEON ELLSWORTH COOK,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

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JOINT APPENDIX

374 [Filed in Open Court August 6, 1956]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled June 28, 1956, Sworn in on July 3, 1956

The United States of America	)	Criminal No. 818-56
v.	)	Grand Jury No. 1050-56
Ellsworth L. Cook	)	First Degree Murder (22 D.C.C. 2401)

The Grand Jury charges:

On or about July 15, 1956, within the District of Columbia, Ellsworth L. Cook, purposely and with deliberate and premeditated malice, murdered Charles Moore by means of shooting him with a pistol.

/s/ Oliver Gasch

Attorney of the United States in
and for the District of Columbia

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387 [Filed March 26, 1957]

JUDGMENT AND COMMITMENT

On this 22nd day of March 1957 came the attorney for the government and the defendant appeared in person and by counsel, J. Leon Williams, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offense of Second Degree Murder and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) years to Thirty (30) years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Luther W. Youngdahl
United States District Judge

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388 [Filed March 27, 1957]

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO PROCEED WITHOUT PREPAYMENT OF COSTS on appeal

I, Ellsworth Leon Cook, being first duly sworn according to law, depose and say that I am the in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows:

Defense counsel was not present when verdict was returned. 2. Defendant was prejudiced By Government attorney. 3. Defense counsel Failed to subpena witnesses. 4. Defense counsel was not effective. 5. Defendant was represented By only one of the two counsel that he retained. 6. Government witness perjured.

/s/ Leon Ellsworth Cook

[Jurat]

Let the applicant proceed on Appeal without prepayment of costs.

/s/ Luther W. Youngdahl
JUDGE

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389 [Filed April 1, 1957]

NOTICE OF APPEAL

Name and address of appellant Leon Ellsworth Cook #103741
200 - 19th Street, S. E.,
Washington, D.C.

Name and address of appellant's attorney

Offense Second degree murder

Concise statement of judgment or order, giving date, and any sentence
Defendant was found guilty of second degree murder on the 5th of February, 1957, and was sentenced on March 22, 1957, to serve from 10 to 30 years.

Name of institution where now confined, if not on bail District Jail for the District of Columbia, 200 - 19th St., S. E., Washington, D. C.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

March 26th, 1957
Date

/s/ Leon Ellsworth Cook.
Appellant

Attorney for Appellant.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,806

202

LEON ELLSWORTH COOK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

OLIVER GASCH
United States Attorney
LEWIS CARROLL
THOMAS A. FLANNERY
E. TILLMAN STIRLING
Assistant United States Attorneys

United States Court of Appeals
For the
District of Columbia Circuit
FILED SEP 6 1957
Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

Appellant shot decedent, who died a few minutes later. He admitted to the police right after the crime that he had shot decedent and gave them the pistol he had used. Appellant was taken to the hospital where cuts on his hands, received while breaking into the premises, were bandaged, and then he was taken to police headquarters where his statement was reduced to writing. This statement was started three hours after the crime had been committed, and was subsequently used at the trial.

In the opinion of appellee, the following questions are presented:

1. Was appellant's confession properly admitted in evidence?

2. Did the prosecutor's statement in his closing argument that Juanita's call to the police followed "immediately" appellant's call to her constitute a misstatement of the facts when the evidence showed that one call followed the other by only a very few minutes at the most?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,806

LEON ELLSWORTH COOK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On August 6, 1956, appellant was indicted for murder in the first degree resulting from his shooting of Charles Moore on July 15, 1956 (R. 374). On February 5, 1957, a jury returned a verdict of guilty of murder in the second degree (R. 350), and appellant was sentenced to serve from 10 to 30 years imprisonment (R. 387). This appeal follows.

Shortly before six a.m. on July 15, 1956, appellant went to the residence of Charles Moore, the decedent, and Juanita Moore. Prior to her marriage on July 11, 1956, to decedent, Mrs. Moore had been appellant's common law wife and had had a child by him. Appellant was unable to arouse either of the Moores by his knocking on the door of their house and by ringing the bell. He left and drove to a gasoline station six or eight blocks away and

called Juanita on the telephone (R. 262). This call was made about 6:05-6:08. The phone was answered by a man and appellant asked to speak to Juanita, who then took the phone. He asked her why she had not answered the door a few minutes earlier and she replied that she had not heard him knock or ring. He then told her that he was coming back to her house and told her to open the door. In reply to Juanita's inquiry concerning the purpose of the visit he said, "You will find out when I get there." (R. 30).

After appellant hung up, Juanita went back to bed with her husband and related appellant's conversation to him, and asked him whether she should call the police. Decedent told her to call the Ninth Precinct, which she did, telling them that a man was trying to break in (R. 26). While waiting for the police to arrive, they heard the door bell ring twice, and then heard glass breaking. Appellant testified that while waiting for someone to answer the door his hands accidently slipped and he broke the pane of glass out of a panel in the door (R. 268). In his written statement, made shortly after the commission of the murder, he stated that he broke the glass out of the door (R. 180). In any event, appellant did break the glass out of the door whether intentionally or accidentally. Decedent had gone to the closet and taken out a rifle and a pistol and then went into the hall. Juanita heard a single shot from the hall and ran and hid in a closet (R. 28). Appellant came into the room after her and dragged her out of the closet. The police then arrived, and came upstairs. Appellant turned his pistol over to the police with the remark, "I did it. I shot him." (R. 79, 93). The pistol held by decedent was jammed, and could not be fired. The jamming was apparently the result of incorrect cocking of the pistol (R. 82). It had not been fired.

The police estimated that they arrived at the murder scene at about 6:35 a.m. (R. 91). They placed appellant under arrest, he having turned his pistol over to them and admitted committing the murder. The Homicide

Squad was summoned and appellant was taken outside to await their arrival. Appellant was then taken to D.C. General Hospital to have his hands bandaged (R. 121). From there he was taken to the Homicide Squad room at Police Headquarters arriving about 9:00 a.m. (R. 101, 143). Officer Rudbeck, who was in charge of the questioning, first told appellant that anything he said might be used against him. No threats or promises were made (R. 144). Appellant was told that he did not have to make a statement (R. 102). He then told his story orally, and at 9:37 a.m. the written statement was started, and was finished at 11:18 a.m. (R. 152). The written statement was introduced into evidence and read to the jury (R. 175-184). In both his written statement (R. 180), and his testimony (R. 222), appellant stated that he did not have his gun drawn but only drew and fired after he saw decedent at the top of the stairs pointing two guns at him. The court instructed the jury on the law of self defense (R. 337-340).

STATUTE INVOLVED

D.C. Code, Section 22-2403 (1951 Ed.) provides:

> "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree."

SUMMARY OF ARGUMENT

Immediately after the murder appellant gave his pistol to the police and told them that he shot decedent. He was subsequently taken to the hospital where his hands were bandaged and then to police headquarters where he immediately began a voluntary narration of what happened. He was cautioned that he did not have to make a statement and that it could be used against him. It was then reduced to writing starting less than three hours after his arrest. Clearly it cannot be said that the confession so obtained was the fruit of any wrong-

doing by the police, nor was it taken during a period of illegal detention.

Government counsel's remarks made during his closing argument to the jury were based entirely on the evidence. Decedent's wife said she called the police after talking to appellant on the phone. In summarizing the evidence the prosecutor said to the jury that after appellant's call to her, Juanita immediately called the police. The time between the two calls was only a matter of a few minutes, so it cannot be said that the prosecutor misstated the facts by describing one call as coming immediately after the other. Furthermore, the jury were told by the court that they were the sole judges of the facts, so the adverb employed by the prosecutor to describe a period of time could not have prejudiced appellant.

ARGUMENT

I.

The Confession Was Properly Admitted

Minutes after the murder appellant gave his pistol to the police and told them "I did it. I shot him." When the police arrived on the scene he still had the weapon in his hand. He was immediately taken into custody, the Homicide Squad, a patrol wagon, and an ambulance were all called. Appellant was taken from the scene of the crime to the hospital where his hands were bandaged, and then to headquarters. Having already obtained a confession at the scene of the crime, the police sought to reduce appellant's version of what had happened to writing. This was done shortly after he arrived at the police station.

It cannot be said that appellant was taken to headquarters in order that the police could extract a confession. This they already had from his lips right after the crime. Apellant's position from the very outset was that he shot in self defense. A reading of the written statement shows that it is not a confession to murder,

but rather is an exculpatory statement putting forth appellant's defense. Having been caught with the gun in his hand and the victim at his feet, appellant had no defense other than self defense. In addition to making such defense in his written statement, he also presented it in his testimony during the trial.

Appellant has the burden of showing that the written statement was illegally obtained. *Watson* v. *United States,* —— U.S.App.D.C. —— (No. 13,689, decided August 19, 1957). Appellant was not taken to police headquarters "in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt." *Mallory* v. *United States,* 354 U.S. 449, 454 (1957). Probable cause for the arrest had already been obtained through appellant's own on-the-scene admissions. Upon arriving at headquarters from the hospital, appellant was told that he did not have to make a statement and that any statement he made could be used against him.[1] He testified that he immediately began a narration of the events leading up to and concluding with the murder, and when finished repeated his story so that it could be taken down in writing (R. 228). There is absolutely no element in this case of the cat and mouse routine wherein the police try to get the accused to make an admission of guilt. Here appellant admitted the murder immediately, was treated at a hospital, and then went to police headquarters to put his story in writing. Consequently, it canont be said that appellant's written statement was *extracted* from him, nor was it the fruits of wrongdoing by the police. See *United States* v. *Mitchell,* 322 U.S. 65, 69 (1944) wherein the Supreme Court upheld the admission of a confession obtained under circumstances similar to the present case.

Assuming that the statement was inadmissible, appellant's substantial rights were not prejudiced by its ad-

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[1] The importance of such a warning is pointed out in Rettig v. United States, 99 U.S.App.D.C. 295, 302, 239 F.2d 916 (1956).

mission. Decedent's wife testified that immediately after hearing a gun shot in the hall appellant rushed into her room, grabbed her and said, "I got him. I might as well get you, too." (R. 28). The police testified that appellant admitted that he had shot decedent. Further in his testimony appellant admitted shooting decedent. Therefore, the only effect of the written statement was cumulative and corroborative. It also presented his theory of self defense. Manifestly, no prejudice ensued to appellant from its admission.

II.

The Prosecutor's Closing Statements Were Proper

Appellant now objects to the statement of the prosecutor in his closing argument where he said (R. 301):

> "Isn't it pretty obvious that when he called he must have sounded rather menacing and angry? Otherwise after he made the call why would Juanita Moore have been so concerned that she immediately called the police?"

Appellant argues that the use of the word "immediately" constituted a misstatement of the facts by the prosecutor which so prejudiced appellant's rights that a new trial should be granted. The record supports the above quoted statement by the prosecutor, and furthermore such closing remarks in no way prejudiced appellant.

In his effort to show that Juanita did not call the police "immediately" after his phone call, appellant pieces together various witnesses' testimony and comes up with the result that the call to the police could not have been immediate. Analysis reveals the error in this sophistical argument. The testimony of Juanita cannot be related to the actual time of day because she said, "I didn't look at the clock" (R. 24). However, she did testify that after appellant hung up the phone at the other end of the line, she went back to bed and related the terse conversation to her husband, and then called the police. The two

police officers who responded to Juanita's call stated that it came in at approximately 6:30 a.m. It is obvious that neither officer was attempting to pin-point the time to the minute, but always prefaced their statement of time with "about" or "approximately". When appellant hung up the phone he drove back to decedent's house which drive took about eight to ten minutes (R. 265). He then rang the door bell and knocked for several minutes, broke the glass, opened the door and entered. As he started up the stairs he saw decedent and shot him.

Taking either appellant's or Juanita's version, which differ only slightly, it appears that the murder took place ten or fifteen minutes after appellant's call to Juanita. She obviously must have called the police prior to the crime, since they arrived a minute or two after it had been committed. Consequently Juanita's call to the police followed appellant's call to her by not more than about ten minutes. Surely it does not constitute error, indeed not reversible error, for the prosecutor to refer to Juanita's call to the police as being made immediately after appellant's call to her. The fact remains that she did call the police prior to the time appellant entered and shot her husband, so whether the time interval was "immediate" as described by the prosecutor or was slightly longer, no prejudice was done to appellant. As this Court said in *Stewart* v. *United States,* —— U.S.App.D.C. ——, (No. 12944, decided April 18, 1957): "True, a prosecutor's words are not prejudicial error if the jury would understand from the context that they represent merely advocacy rather than testimony." See also *Pritchett* v. *United States*, 87 U.S.App.D.C. 374, 376, 185 F.2d 438 (1950).

Appellant argues (Br. 23) that the misstatement by the prosecutor was further aggravated when the court in its charge told the jury (R. 330):

> "The Government claims that Juanita then called No. 9 Precinct Police Station and while awaiting the police heard the doorbell ring several times and then heard a crash of glass and footsteps on the stairway leading to the second floor."

There was no error in this statement by the Court. It *was* the Government's position that Juanita did call the police after appellant's call to her. The fact that the Court said "Juanita then called" the police was supported by the testimony of Juanita herself. Juanita, in her testimony, gave a narrative account of what happened on the fateful morning, saying that following appellant's call she went back to bed to repeat the conversation to her husband, who then told her to call the police. She did not ever attempt to relate the events to the clock, other than to say that appellant's call was around six o'clock in the morning. The fact that the police stated that Juanita's call to the precinct station was around six-thirty proves nothing except that her surmise that appellant's call was around six a.m. was incorrect by a few minutes. It will be seen that the portion of the charge now objected to, no objection having been made at trial as required by Rule 30, F. R. Crim. P., is merely the court's summation of what the Government claimed the facts were. The court clearly told the jury that they were the sole judges of the facts and their recollection should govern (R. 326, 334).

III.

The Evidence Supports The Verdict Of Murder In The Second Degree

Appellant argues that the fact that he broke the glass in the door with his hands rather than with the gun butt, and the fact that he did not have his gun drawn as he entered indicate such irrationality on his part as to negative malice, thereby making the crime manslaughter. Appellant's testimony was that his hand slipped and broke the glass accidentally, while his written statement indicated that he broke the glass out of the door intentionally. Even if appellant broke the glass intentionally it certainly would not indicate a lack of malice such as to reduce the crime to manslaughter. Nevertheless both

second degree murder and manslaughter were submitted to the jury along with murder in the first degree.

Appellant conjectures further that he lacked malice because he did not have his gun drawn as he entered the premises. Of course we have only his testimony on this point. However, he was able to draw his gun from under his shirt and fire at decedent before the latter could fire either of his two firearms which were already drawn. However, the fact that appellant broke into the house (he does not deny that he reached inside and opened the door after the glass had been broken out) after making a threatening phone call, and armed with a loaded pistol is ample support for the jury's finding of the necessary malice. Perhaps the jury could have found a lack of malice in appellant's actions and returned a verdict of manslaughter, but the facts of this case do not require such a verdict.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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